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THE NORTHWEST POWER ACT AND RESERVED TRIBAL RIGHTS

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The Pacific Northwest Electric Power Planning and Conservation Act[1] (Northwest Power Act) provides:

> Nor shall any provision of this Act or any plan or program adopted pursuant to the Act (1) affect the rights or jurisdictions of the . . . Indian tribes . . . over waters of any river or stream or over any groundwater resource . . . [or] (3) otherwise be construed to alter or establish the respective rights of . . . Indian tribes . . . with respect to any water or water-related rights.[2]

Reserved tribal rights therefore are not affected by the Act.[3] Those rights, which include treaty reserved fishing rights and, implicitly, reserved water rights, are a mandate for fish preservation, independent of the fish protection provisions of the Northwest Power Act.[4] As such, they must be respected by implementors of the Act, regardless of its other provisions.

Since the implementation of the Act's fish protection provisions will undoubtedly affect the scope of protection provided to Indian tribes, the Act's ambiguities must be interpreted in a way that honors and preserves these reserved tribal rights.[5] This article examines the substantial body of case law applicable to these reserved tribal rights, with particular attention to the major fish protection issues that may arise under the Act.

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1. Pub. L. No. 96-501, 94 Stat. 2697 (1980) (codified at 16 U.S.C. § 839–839h (Supp. V 1981)) [hereinafter cited as Northwest Power Act].

2. Northwest Power Act, *supra* note 1, § 10(h), 16 U.S.C. § 839g(h) (Supp. V 1981).

3. The Supreme Court has been "extremely reluctant" to find a congressional abrogation of reserved tribal rights, absent explicit statutory language. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979). *See also* United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002 (8th Cir. 1976) (Army Corps of Engineers lacked congressional authorization to construct dam and reservoir adversely impacting reserved tribal rights); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Or. 1977) (same).

4. The fish protection provisions are found in Northwest Power Act, *supra* note 1, §§ 2(3)(A), 4(e)(2), & 4(h), 16 U.S.C. §§ 839(3)(A), 839b(e)(2), & 839b(h) (Supp. V 1981).

5. *Cf.* Bryan v. Itasca County, 426 U.S. 373, 392 (1975) (statutes passed for benefit of Indians must be liberally construed, with doubtful expressions resolved in favor of Indians); McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 174 (1973) (same principle applied to Indian treaties); Escondido Mutual Water Co. v. Fed. Energy Reg. Comm'n, 692 F.2d. 1223 (9th Cir. 1982) (same principle applied to statutes).

The Northwest Power Act presents an ambitious congressional mandate in response to a very serious problem: the drastic reduction of highly valuable fish resources by poorly planned hydroelectric development.[6] The Act requires that anadromous fish supplies be preserved and enhanced, and any adverse impacts mitigated.[7] But the purpose of this article is not to analyze the Act's statutory language on fish conservation and protection.[8] Rather, it focuses on what must be done to comply with a much older body of law: the Stevens Treaties' fishing rights[9] and the tribal right to water under the *Winters* Doctrine.[10] These rights, which le-

6. For a good discussion of how poorly planned hydro development can exact enormous and unnecessary costs in terms of fish resources, see Blumm, *Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources for a Peaceful Coexistence with the Federal Columbia River Power System*, 11 ENVTL. L. 211, 217–49 (1981).

7. *See* Northwest Power Act, *supra* note 1, § 4(h), 16 U.S.C. § 839b(h) (Supp. V 1981) (the "4(h) program"); *Fish and Wildlife Program Approval Issues: A Legal Perspective On Scientific Proof, Economic Cost, and Indian Treaty Rights*, NATURAL RESOURCES LAW INST., 17 ANADROMOUS FISH LAW MEMO, Apr. 1982, at 1. Although the 4(h) program is directed primarily at problems in the Columbia River Basin, Congress expected similar treatment for the fish resource throughout the area affected by the Act. *See* Northwest Power Act, *supra* note 1, §§ 2(3)(A), 4(e)(2), & 10(A), 16 U.S.C. §§ 839(3)(A), 839b(e)(2), & 839g(h) (Supp. V 1981); H.R. REP. No. 976, Part II, 96th Cong., 2d Sess. 38 (1980). The 4(h) program should be viewed as a model of the detailed, procedural and substantive standards which must be a part of any future energy planning and production. Treaty fishing rights are not limited to the Columbia. When Congress explicitly acknowledged the need to protect all reserved tribal rights, it obviously contemplated fish protection measures throughout the region. Northwest Power Act, *supra* note 1, § 10, 16 U.S.C. § 839g (Supp. V 1981). *See also Fish and Wildlife Protection Outside the Columbia River Basin Under the Northwest Power and Conservation Act*, NATURAL RESOURCES LAW INST., 20 ANADROMOUS FISH LAW MEMO, Dec. 1982, at 1.

8. For this analysis see Blumm, *Fulfilling the Parity Promise: A Perspective on Scientific Proof, Economic Cost, and Indian Treaty Rights in the Approval of the Columbia Basin Fish and Wildlife Program*, 13 ENVTL L. 103 (1982).

9. Isaac Ingalls Stevens, governor and Superintendent of Indian Affairs in Washington Territory in the 1850's, negotiated a series of treaties with Pacific Northwest Indians beginning in 1854. These treaties, known collectively as the Stevens Treaties, secured for the new Washington Territory 64 million acres of Indian land. Comment, *Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest*, 10 ENVTL. L. 413, 416–17 (1980). *See also infra* part II.

Stevens negotiated the following treaties: Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132; Treaty of Point Elliot, Jan. 22, 1855, 12 Stat. 927; Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933; Treaty of Neah Bay, Jan. 31, 1855, 12 Stat. 939; Treaty with the Walla Walla, June 9, 1855, 12 Stat. 945; Treaty with the Yakimas, June 9, 1855, 12 Stat. 951; Treaty with the Nez Perce, June 11, 1855, 12 Stat. 957; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty with the Quinaielts, July 1, 1855 & Jan. 25, 1856, 12 Stat. 971; Treaty with the Flathead, July 16, 1855, 12 Stat. 975.

10. The *Winters* Doctrine derives its name from Winters v. United States, 207 U.S. 564 (1908). The doctrine stands for the proposition that when the United States establishes an Indian reservation, sufficient water rights are impliedly reserved to realize the purposes of the reservation. *See generally* Pelcyger, *The Winters Doctrine and the Greening of the Reservations*, 4 J. CONTEMP. L. 19 (1977).

In *Winters*, the Court enjoined the construction of off-reservation dams or reservoirs that would deprive the Fort Belknap Indian Reservation of the water needed to irrigate its arid land. The *Winters* Doctrine is not limited to irrigation needs. Fishery needs may also be the basis of a reserved water right under the doctrine. *See* Cappaert v. United States, 426 U.S. 298 (1976); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981). Where a primary

gally cannot be compromised, must be provided for when the fish conservation provisions of the Act are implemented.

I. RULES FOR CONSTRUING TREATIES AND OTHER TRIBAL RIGHTS

A. No Balancing

One of the unique aspects of reserved tribal rights is that they are not considered susceptible to balancing against other priorities; tribal fish and water rights are property interests. They stem from Indian property rights which pre-existed the formation of the United States.[11] At the time Europeans happened upon this part of the world, principles of international law mandated that the property rights of the original inhabitants be fully respected.[12] Absent purchase through treaty or agreement, or acquisition by a "just war," these rights were to remain undiminished.[13]

The Stevens Treaties were designed to permit the purchase of lands occupied by the Northwest Indians, presumably on fair and honorable terms.[14] To sweeten the deal, the protection of fishing rights was guaranteed.[15] Thus, the land cessions were not intended to diminish tribal fishing rights in any significant way. The only limitation on tribal fishing anticipated by the parties to the treaties was that non-Indians would be able to harvest a share of the abundant fish resource.[16]

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purpose of an Indian land reservation is to secure an on-reservation fishery for the tribe, that tribe has a right, dating from at least the reservation's establishment, to sufficient water to maintain the on-reservation fishery. *See id.* at 48; United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286 (9th Cir. 1981), *modified,* 666 F.2d 351 (9th Cir.), *cert. granted,* 103 S. Ct. 205 (1982); United States v. Anderson, 6 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) F-129 (E.D. Wash. July 23, 1979), 9 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 3137 (E.D. Wash. Aug. 23, 1982); United States v. Adair, 478 F. Supp. 336, 345 (D. Or. 1979), *appeal docketed,* Nos. 80-3229, 80-3245, 80-3246, 80-3257 (9th Cir. filed June 18, 1980).

11. United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1289, 1305 (9th Cir. 1981) (water rights), *modified,* 666 F.2d 351 (9th Cir.), *cert. granted,* 103 S. Ct. 205 (1982); United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 338–39 (9th Cir. 1956) (water rights), *cert. denied,* 352 U.S. 988 (1957); Northern Paiute Nation v. United States, 30 Ind. Cl. Comm. 210 (1973) (water rights); Whitefoot v. United States, 293 F.2d 658, 659 (Ct. Cl. 1961) (fishing rights), *cert. denied,* 369 U.S. 818 (1962).

12. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 50–58 (1982) [hereinafter cited as 1982 HANDBOOK].

13. *Id.*

14. *Id.* at 66–70, 330–31. The tribes were paid $207,500 for millions of acres of land which were clearly worth far more. The Supreme Court has noted that this fact was significant in determining the scope of the fishing rights reserved by the Stevens Treaties. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 677 & n.11 (1979).

15. 1982 HANDBOOK, *supra* note 12, at 66.

16. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 668 (1979).

The water rights that the tribes reserved are also substantial property rights and are entitled to unqualified protection. They extend to all the water appurtenant to the Indians' land reservations that is necessary to achieve the purposes of those reservations,[17] including the preservation and enhancement of fisheries.[18]

The concept that reserved tribal rights cannot be balanced away because of other priorities or concerns has been recognized by both the Supreme Court and lower courts.[19] This no-balancing concept is crucial when measuring tribal rights to fish habitat protection. It distinguishes those rights from other environmental protections afforded under federal or state statutes.[20]

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17. Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546, 598–600 (1963).

18. Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir.), *cert. denied*, 453 U.S. 1092 (1981).

19. *See, e.g.*, Cappaert v. United States, 426 U.S. 128, 138–39 (1976) (water rights); New Mexico v. Aamodt, 537 F.2d 1102, 1113 (10th Cir. 1976) (water rights); United States v. Adair, 478 F. Supp. 336, 344–45 (D. Or. 1979), appeal docketed, Nos. 80-3229, 80-3245, 80-3257 (9th Cir. filed June 18, 1980).

Substantial non-Indian investment based on a mistaken assumption that reserved tribal rights were not being violated is simply irrelevant, as it would be in any other trespass action. *See* Cappaert v. United States, 426 U.S. at 138–39; United States v. Walker River Irrigation Dist., 104 F.2d 334, 339 (9th Cir. 1939); New Mexico v. Aamodt, 537 F.2d at 113; 1982 HANDBOOK, *supra* note 12, at 587. Another important aspect of the principle that reserved tribal rights are not subject to judicial compromise is that tribes are not bound by state statutes of limitations or common law notions of estoppel and laches in relying upon them. *See* Capitan Grande Band of Mission Indians v. Helix Irrigation Dist., 514 F.2d 465 (9th Cir.), *cert. denied*, 423 U.S. 874 (1977); United States v. Southern Pacific Transp. Co., 543 F.2d 676, 699 (9th Cir. 1976). *See also* Utah Power & Light Co. v. United States, 243 U.S. 389, 408–09 (1917) (erroneous or unauthorized actions by federal officials do not excuse violations by "innocent" third parties who relied on those actions); Cramer v. United States, 261 U.S. 219, 234 (1932) (same); Ewert v. Bluejacket, 259 U.S. 129, 138 (1922) (same).

20. In Phase II of United States v. Washington, *see infra* text accompanying notes 45–49, the district court was careful to follow this principle. United States v. Washington, 506 F. Supp. 187, 206, 208 (W.D. Wash. 1980). On appeal, the Ninth Circuit attempted to distinguish the reserved fishing right from reserved water rights in regard to the balancing issue. United States v. Washington, 694 F.2d 1374, 1383–84 (9th Cir. 1982). This holding may be questioned in light of the Supreme Court's reliance on water rights principles in measuring the scope of the treaty fishing right. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685–86 (1979). The Phase II panel provided no precedent for its holding, and it seems to have confused the scope of the treaty right with the equitable considerations available to courts when providing specific remedies for its violation. In another case decided a few months earlier, another panel of the Ninth Circuit Court of Appeals relied upon the Phase II district court decision and applied the distinction between the scope of the right and the appropriate remedy. Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation, Nos. 80-3505, 81-3002, 81-3068, 81-3069 (9th Cir. Sept. 16, 1982). The court described the duty to refrain from degrading treaty-secured fisheries in absolute terms. The remedy, however, required the parties to attempt to accomodate both the needs of the tribe and those of the irrigation districts involved. Pending a report to the court on how this might be done, the treaty fishery was given priority. *Id.* Petitions for rehearing are pending in both cases, and en banc review is being sought because of the apparent inconsistencies between these two decisions.

Therefore, whatever cost/benefit analysis or other balancing that the Northwest Power Act may permit as to the non-treaty fish and water share, the tribal share remains undiminished and not subject to trade-off for other uses, such as electricity. In other words, the quantity of the resource reserved by the tribes should determine the scope of protections that must be afforded. These protections may not be defined merely by balancing the competing interests.

B. Identifying the Breadth of Treaty Rights

Indian treaties are entitled to a broad and liberal construction which (1) is consistent with the understandings of the treaty negotiators and (2) furthers the purpose of the treaty right.[21] Interpretations should take into account the unequal bargaining position of the parties, language barriers, and similar disadvantages faced by the tribes.[22] The likely Indian understanding is entitled to greater consideration than any particular technical definition of legal terms.[23] Furthermore, any right which Indian people did not expressly give up is generally deemed reserved.[24] Ambiguities in treaties, statutes, executive orders, or agreements regarding Indian rights and immunities are to be resolved in favor of protecting Indian interests.[25]

Thus, the first and most important step in interpreting the scope of reserved tribal rights is to understand the circumstances under which the Indian treaties were made and the Indians' land reservations were established.

II. THE SCOPE OF THE STEVENS TREATIES FISHING PROVISION

A. Historical Background of the Stevens Treaties

The language of the fishing provisions in the Stevens Treaties is typified by the Treaty of Medicine Creek, which provides:

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21. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1979).

22. *Id.*

23. *Id.*; *see also* Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Jones v. Meehan, 175 U.S. 1, 11 (1899); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551–54, 582 (1832).

24. United States v. Winans, 198 U.S. 371, 381 (1905).

25. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1979) (treaty); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) (statutes); Bryan v. Itasca County, 426 U.S 373, 392 (1976); Antoine v. Washington, 420 U.S. 194, 199–200 (1975) (agreement); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 264, 174 (1973) (treaty and statutes); Arizona v. California, 373 U.S. 546, 600 (1963) (executive order).

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens.[26]

In 1979, the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n (Fishing Vessel)*[27] flatly rejected the argument that this language secured nothing more than an opportunity to try to catch fish on an equal basis with non-Indians. The Supreme Court said:

> For notwithstanding the bitterness that this litigation has engendered, the principal issue involved is virtually a "matter decided" by our previous holdings.
>
> The Court has interpreted the fishing clause in these treaties on six prior occasions. In all these cases the Court placed a relatively broad gloss on the Indians' fishing rights and—more or less explicitly—rejected the State's "equal opportunity" approach . . . .[28]

In reaching this conclusion, the Supreme Court briefly reviewed the background of the treaty negotiations.[29] The Court's reading of this background is, of course, crucial to defining the scope of any reserved tribal rights.[30]

The Northwest tribes were primarily fishing societies, who also relied on hunting and gathering. The abundant fish resource was the lifeblood of their economy and culture. To protect salmon and trout, tribes had customs to prevent pollution of rivers, particularly during spawning. They practiced religious rites to ensure the return of anadromous fish. When Governor Stevens undertook to negotiate the release of Indian land claims in Washington Territory, he realized the Indians would be far more willing to give up their land if they knew their fisheries would be secure.

A major part of Governor Stevens' job of selling the treaties to the Indians therefore was convincing them that non-Indian settlement would never threaten their highly successful fish-dependent economies and culture. The following words were typical of the guarantees the Governor made:

26. Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132, 1133. Other treaties, such as the Treaty of Point No Point, state that the Indians' right to take fish at accustomed places is secured to Indians "in common with all citizens of the United States." 12 Stat. 933, 934.

27. 443 U.S. 658 (1979).

28. *Id.* at 679. The Supreme Court also rejected the argument that the treaties were not "self-enforcing." *Id.* at 693 n.33.

29. *Id.* at 664–68, 676.

30. *See supra* note 9 and text accompanying notes 11–23.

> Are you not my children and also the children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? . . . *This paper secures your fish.* Does not a father give food to his children?[31]

While the tribes understood that the treaties would allow non-Indians a share of the resource, they were assured that their share was secure.[32] The tribes would not have expected that non-Indians could permanently diminish or destroy the supply of fish available to them.

The treaty negotiators clearly intended the treaties to preclude forever non-Indian settlers from monopolizing the Indian fisheries,[33] regardless of whether this monopolization occurred directly through commercial harvests or indirectly through energy development. At the time of the treaties, the tribes were the chief entrepreneurs in developing the resource; Indian fish harvests were increasing to accomodate the growing commercial markets for both local non-Indian consumption and export.[34] All indications were that the Indians would continue to dominate the Northwest fish industry.[35] After the treaties were signed, federal officials promoted the expansion of Indian fish enterprises, by encouraging the development of new markets for Indian-caught fish as the non-Indian population increased.[36] For a few decades the promise to preserve and protect the cornerstone of Indian economic self-sufficiency and culture appeared to be honored.

B. Judicial Enforcement of the Stevens Treaties Rights

At the end of the nineteenth century, it became apparent that non-Indians were attempting to monopolize the salmon resource for their own purposes, thereby depriving the tribes of their treaty share. As early as 1905,

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31. This statement was made during the negotiations of the Point No Point Treaty, and is quoted in *Fishing Vessel*, 443 U.S. at 667 n.11 (emphasis added).

32. *Id.*

33. *Id.* at 666.

34. *Id.* at 664–65 & nn. 7 & 8.

35. *Id.* at 668–69; *see also* United States v. Washington, 384 F. Supp. at 350–52 (W.D. Wash. 1974) (describing Indian fishing activity at the time of the treaty negotiations).

36. For example, a few years after the treaties, Indian Agent Simmons reported:

> The salmon that run up the Qui-nai-elt river, in great numbers, are considered the fattest and best flavored of any taken on this coast, and the Indians should be encouraged to open a trade in them. I think they can be more profitably employed at present in this way than in agricultural pursuits, as it will be a more congenial employment for them.

Brief for Appellee United States at 22, United States v. Washington, 694 F.2d 1374 (9th Cir. 1982).

in *United States v. Winans,*[37] the Supreme Court ruled that the treaty was intended to preserve the tribes' fish supply, and not merely to provide them an opportunity to catch whatever non-Indians chose not to use.

In *Winans,* the United States sued on behalf of the Yakima Indian Nation to prevent a non-Indian from taking all the fish at a tribal fishing area while excluding Indian fishermen from his land. The successful suit established two important legal principles. First, the treaty fishing right meant that non-Indian settlers could not destroy an entire fish run destined for a traditional tribal use.[38] Second, the land acquired from the Indians pursuant to the treaty was encumbered to the extent necessary to fulfill treaty fishing rights; Indians were free to cross private property to get to their accustomed fishing areas.[39]

The Supreme Court has had other occasions to point out that the treaty right to fish is different from the rights of ordinary citizens. In *Tulee v. Washington,*[40] the Court struck down enforcement of state licensing requirements against a treaty Indian. And, in a series of cases involving the Puyallup Tribe,[41] the Court emphasized that the treaties guaranteed more than merely equal fishing opportunities between Indians and non-Indians. Rather, the treaties guaranteed that fish would be allowed to reach their usual and accustomed areas. Finally, in *Fishing Vessel,*[42] the Court repeatedly stressed that the treaties secured a "right of *taking* fish," not merely an opportunity to drop a net in barren water.[43]

C. *Tribal Fishing Rights Under the Stevens Treaties:* United States v. Washington

In 1969, a federal district court judge ruled in *Sohappy v. Smith*[44] that treaty Indians had "an absolute right" to Columbia River fisheries and were "entitled to a fair share" of the fish produced by that system.[45] No party appealed the decision. Nevertheless, the State of Washington con-

37. 198 U.S. 371 (1905).

38. *Id.* at 382 (white men may not "construct and use a device which gives them exclusive possession of the fishing places").

39. *Id.* at 380–81. *See also* Fishing Vessel, 443 U.S. at 679–81 (discussing *Winans*); Seufert Bros. Co. v. United States, 249 U.S. 194, 198 (1919) (treaty Indians have right to fish in accustomed places, even in areas outside reservations).

40. 315 U.S. 681 (1942).

41. Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977); Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

42. 443 U.S. 658 (1979).

43. *Id.* at 674, 677 n.22, 683 (emphasis added).

44. 302 F. Supp. 899 (D. Or. 1969).

45. *Id.* at 911.

tinued to arrest and seize property of treaty Indians who attempted to exercise their fishing rights.

Because of Washington's refusal to recognize treaty fishing rights, the United States, in 1970, sued the state to adjudicate comprehensively the limits of state power over treaty fisheries. Additional tribes intervened on their own behalf. Plaintiffs alleged that the state violated treaty fishing rights in two ways: (1) by permitting non-Indian fishermen to harvest virtually all the runs before they reach the Indians' customary fishing grounds; and (2) by authorizing degradation of environmental conditions essential for fish survival. The litigation was bifurcated to resolve separately the harvest management claims ("Phase I") and the habitat degradation claims ("Phase II").

1. Phase I: The Right to Harvest

In Phase I, Judge George H. Boldt followed the court's lead in *Sohappy v. Smith*. By interpreting the "in common" language of the Stevens Treaties to require equal sharing between Indian and non-Indian fishermen, Judge Boldt determined that fifty percent of each fish run destined for or passing through traditional tribal fishing areas should be allocated to treaty tribes.[46] The Court of Appeals for the Ninth Circuit agreed.[47] Like the district court, it held that state power to regulate treaty fisheries was limited to non-discriminatory measures reasonable and necessary for conservation. The court analogized tribal and state interests in the fishery to a cotenancy and said "neither the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed."[48]

The Supreme Court affirmed Judge Boldt's allocation of fifty percent of each run destined for the tribes' usual and accustomed fishing places,

46. The Phase I litigation has produced several reported opinions. The initial decision is United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Various Post-Trial Decisions, entered in 1978, are reported at United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1978); appeals from these decisions were dismissed, 573 F.2d 1117 (9th Cir. 1978), 573 F.2d 1118 (9th Cir. 1978), 573 F.2d 1121 (9th Cir. 1978). The Post-Trial Decisions were affirmed *sub nom.* Puget Sound Gillnetters Ass'n v. United States Dist. Court, 573 F.2d 1123 (9th Cir. 1978), *aff'd in part, vacated in part, and remanded sub nom.* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (*Fishing Vessel*).

47. United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

48. *Id.* at 685.

relying on the precise language of the treaty.[49] The critical language was the "in common" phrase. The Supreme Court noted:

> The logic of the 50% ceiling is manifest. For an equal division—especially between parties who presumptively treated with each other as equals—is suggested, if not necessarily dictated, by the word "common" as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances.[50]

Not only was there substantial common law support for this interpretation, particularly in international law,[51] there was evidence that Indians understood the division would be of equal shares. Chinook jargon, the trade medium used to negotiate the treaties, had a vocabulary limited to 300 words, making translation and negotiation inexact at best. But evidence from the time of the treaties suggests that "in common with" implied a concept of equal sharing.[52]

While the Supreme Court settled that the tribes reserved up to half of their traditional 1854–1855 fisheries, there is still judicial confusion about the "floor" of the tribes' right at any given time. Perhaps this "floor" can be found in the Court's interpretation that the treaty secured enough fish to meet the tribes' "moderate living" needs.[53] If this is the case the tribes are not "guaranteed" any fixed percentage of the runs, but rather are entitled to a quantity of the resource sufficient for their present and future needs.[54] Absent proof that tribes could no longer "reasonably" need half of their treaty time resource, non-Indians cannot usurp the tribes' treaty-secured share for any reason.[55]

2. *Phase II: The Right to Fishery Habitat Protection*

Having a guaranteed right to fish, the Indians presumably would have a

49. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (*Fishing Vessel*).

50. *Id.* at 686 n.27.

51. *See id.* at 677 n.23 (noting that the United States has used "in common with" language in treaties with Britain, giving each signatory an "equal" and "apportionable" share of fish in treaty areas).

52. *Id.* at 667 n.10; *see also* United States v. Washington, 384 F. Supp. 312, 355–56 (W.D. Wash 1974).

53. *Fishing Vessel*, 443 U.S. at 686. The appropriate interpretation of this "moderate living" concept is discussed below. *See infra* text accompanying notes 96–127.

54. *Fishing Vessel*, 443 U.S. at 686–87. The guarantee is analogous to judicial doctrine in the area of reserved water rights. *See, e.g.*, Arizona v. California, 373 U.S. 546, 598–601 (1963).

55. *Fishing Vessel*, 443 U.S. at 687.

right to protect the fish resource from destruction. Even before the Stevens Treaties were negotiated, courts recognized a right of the general public to be protected from fish loss caused by human alterations of the environment. For example, in *Stoughton v. Baker*,[56] the Massachusetts Supreme Court held that a grant of the right to build a dam carried with it an implied duty to provide passage for fish.[57] Courts have also recognized causes of action in nuisance by state governments or fishermen to prevent degradation of water conditions essential for fish survival.[58] Both state governments, as parens patriae, and ordinary fishermen may have causes of action for money damages in the event fish are destroyed by environmental degradation.[59]

Before the Phase II decisions, it had been held that because the treaty fishing right is a property interest, the United States must compensate tribes for damaging treaty fisheries by government projects. For example, in *Whitefoot v. United States*,[60] the court recognized that because Congress chose to allow fish loss by authorizing construction of the Dalles Dam on the Columbia River, it also had to compensate the affected treaty tribe.[61]

Moreover, declaratory and injunctive relief had also been awarded to protect the habitat of treaty fisheries. In 1973, the Umatilla Tribe obtained a court order requiring the Bonneville Power Administration and the Army Corps of Engineers to operate the Federal Columbia River Power

56. 4 Mass. 521, 528 (1808).

57. *Id.* at 528. *See also* Holyoke Co. v. Lyman, 82 U.S. (15 Wall.) 500, 520 (1872) (state authorization to build a dam carries with it an implied obligation to provide passage for fish); Cottrill v. Myrick, 12 Me. 222, 229–31 (1835) (legislature has power to require landowners who erect or maintain dams to provide passage for fish); Commonwealth v. Chapin, 22 Mass. 203, 206–09, 5 Pick. 199 (1827) (landowners who erect or maintain dams have implied duty to provide passage for fish); State v. Roberts, 59 N.H. 256, 257 (1879) ("the right to have migratory fish pass in their accustomed course up and down rivers and streams is a public right").

58. *See* People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897) (nuisance action brought by state); Columbia River Fishermen's Protective Union v. St. Helens, 160 Or. 654, 87 P.2d 195, 198 (1939) (nuisance action brought by fishermen).

59. *See* Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (action for damages brought by fishermen); Dep't of Fisheries v. Gillette, 27 Wn. App. 815, 621 P.2d 764 (1980) (action for damages brought by state). Unlike ordinary fishermen, Indian fisherman would have faced many obstacles, at treaty time, if they had to rely on whatever protection state common law or statutes provided for their fish habitat. For Indians, suing in state courts was problematic. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 162–63 (1948); United States v. Kagama, 118 U.S. 375 (1886). The communal nature of their fishing right might have limited remedies of individual fishermen to suits by the tribe. Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962). But, the tribe's right to sue without congressional authorization was unclear. F. COHEN, *supra*, at 283–85.

60. 293 F.2d 658, 659 & n.1, (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962).

61. *Id.* at 660. *See also* Northern Paiute Nation v. United States, 30 Ind. Cl. Comm. 210 (1973) (compensation required if federally-authorized water diversions diminished tribal fisheries).

System so as not to "impair or destroy" their treaty fishing rights.[62] In 1977, a federal district court held that the Army Corps of Engineers was not authorized to construct a dam and reservoir which would flood traditional tribal fishing sites and wipe out a steelhead run above the dam.[63] The Corps had planned to "mitigate" the harm by transporting chinook salmon around the dam. The court rejected the Corps plan, however, because even with "mitigation" Indian fishing rights would be impaired, and Congress had not authorized any impairment of treaty fishing rights.[64]

a. The Orrick Decision

In Phase II, Judge William H. Orrick concluded that state-authorized degradation of essential fish habitat conditions could render the treaty right just as meaningless as state harvest management had done.[65] Consequently, he issued a declaratory judgment, ruling that the state could not authorize habitat degradation that impairs treaty fishing rights.[66] While Judge Orrick did not decide whether the state has violated the right, there was no dispute that activities such as watershed alterations, storage dams, and power development have caused fish runs to decline dramatically.[67] The court found that:

> Were this trend to continue, the right to take fish would eventually be reduced to the right to dip one's net into the water . . . and bring it out empty. Such result would render nugatory the nine-year effort in Phase I, sanctioned by this Court, the Ninth Circuit, and the Supreme Court, to enforce the treaties' reservation to the tribes of a sufficient quantity of fish to meet their fair needs. The Supreme Court all but resolved the environmental issue when it expressly rejected the State's contention, initially reiterated on this motion, that the treaty right is but an equal opportunity to try to catch fish. Rather, the Court held that the treaty assures the tribes something considerably more tangible than "merely the chance . . . occasionally to dip their nets into the territorial waters."[68]

Judge Orrick noted that treaty negotiators had reassured the tribes that

62. Confederated Tribes of the Umatilla Indian Reservation v. Callaway, No. 72-211, slip op. at 7 (D. Or. Aug. 17, 1973).

63. Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Or. 1977).

64. *Id.* at 555–56.

65. United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980).

66. *Id.* at 208.

67. *Id.* at 203.

68. *Id.* (citation omitted).

they had nothing to fear from the increased non-Indian settlement of the Puget Sound area.[69] He concluded:

> [T]here can be no doubt that one of the paramount purposes of the treaties in question was to reserve to the tribes the right to continue fishing as an economic and cultural way of life. It is equally beyond doubt that the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless. Thus, it is necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause.[70]

The state argued that it was unnecessary to imply an environmental right because of numerous federal and state programs designed to protect fish habitat.[71] But Judge Orrick held that the adequacy of state laws was a remedies question and that these laws were irrelevant to the scope of the treaty right possessed by the tribes.[72]

To determine the quantity of fish which must be available to the tribes, Judge Orrick adopted the Supreme Court's moderate living needs concept, ruling that the state, as well as the United States and third parties, must refrain from degrading fish habitat to the extent that tribes could not meet their moderate living needs by fishing.[73] How many fish is that? In his Amended Judgment, filed January 16, 1981, he clarified that future development must protect the current amount of fish the tribes are entitled to under the Phase I allocation orders.[74]

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69. *Id.* at 204.

70. *Id.* at 205.

71. *See id.*

72. *Id.* at 205–06. Although the judge left that remedies question for later determination, there is substantial evidence in the record regarding state-authorized habitat degradation. For example, several state officials responsible for fish management conceded, during discovery, that a number of non-federal dams remain complete or partial obstructions to fish migration despite a long standing state law requiring adequate fish passage facilities. *See* WASH. REV. CODE § 75.20.060 (1982). The state officials' testimony may be found in Plaintiffs' Exhibit (PE) 11 at 75; PE 22 at 20 (plaintiffs' second set of interrogatories with defendants' responses). *See also* 506 F. Supp. at 205 n.67; UNITED STATES FISH AND WILDLIFE SERV., WASH. DEPT. OF FISHERIES AND WASH. DEPT. OF GAME, JOINT STATEMENT REGARDING THE BIOLOGY, STATUS, MANAGEMENT, AND HARVEST OF THE SALMON AND STEELHEAD RESOURCES OF PUGET SOUND AND OLYMPIC PENINSULAR DRAINAGE AREA OF WESTERN WASHINGTON 22–25 (1973); I WASH. DEPT. OF FISHERIES, A CATALOG OF WASHINGTON STREAMS AND SALMON UTILIZATION 13 (19XX).

Judge Orrick did provide some guidance on enforcement of the treaty habitat protection right. He listed five conditions which the parties agreed were the minimum conditions essential for survival of salmon and steelhead: (1) access to and from the sea; (2) an adequate supply of good-quality water; (3) a sufficient amount of suitable gravel for spawning and egg incubation; (4) an ample supply of food; and (5) sufficient shelter. 506 F. Supp. at 203.

73. *Id.* at 208.

74. The amended judgment provided that the state obligation was to refrain from impairing tribal "moderate living needs, as implemented through the allocation orders of the District Court in Phase

According to the district court, when proposed activities are challenged, the tribes must bear the initial burden of proving that fish habitat would be degraded "such that rearing or production *potential* of the fish will be impaired or the size or quality of the run will be diminished."[75] The state would then bear the burden of showing that the damage will not occur, that the fish loss will be adequately mitigated, that non-treaty fisheries will absorb the loss, or that for some other reason, the tribes will still be able to harvest their treaty share.[76]

b. The Ninth Circuit Decision In Phase II

Concerned about the ramifications of the treaty right to resource protection and displeased with the vague and confusing "moderate living" standard, the Ninth Circuit panel that heard Phase II sought to apply its own concepts of equity to measure the right. Unfortunately, the court only further confused the issue by adopting a test of "reasonableness" with a number of qualifications.[77] The court in its analysis commits the very mistakes it attributed to the district court, and in reaching its conclusions seems oblivious to the rules of treaty interpretation, prior Supreme Court cases on the Stevens Treaties, and the reserved tribal rights doctrine.

Attempting to draw an analogy to options and other such unrelated "rights," the court said the tribes did not actually "secure" any quantity of fish; rather, they obtained only a just share of the resource.[78] The court stopped short of the logical conclusion of its analysis: that the treaty-secured fish supply can be purposely and totally destroyed by non-Indians without violating the treaty right. The Supreme Court, of course, repeatedly emphasized in *Fishing Vessel* that the tribes did not reserve fifty percent of potentially nothing.[79] The Ninth Circuit panel stated that Indians and non-Indians must share equally the losses from "reasonable," "nondiscriminatory development."[80] In its analysis, the court failed to consider adequately the crucial difference between the risk of fish loss from a natural disaster and fish loss by human interference. While the tribes did not reserve a right to be protected from acts of God or to harvest more than they needed, and in that sense did not reserve a specific quantity of

I." United States v. Washington, 506 F. Supp. 187 (W.D. Wash. 1980), amended judgment, slip. op. at 3 (W.D. Wash., Jan. 16, 1981).

75. 506 F. Supp. at 208 (emphasis added).

76. *See id.*

77. United States v. Washington, 694 F.2d 1374, 1375 (9th Cir. 1982).

78. *Id.* at 1380–82, 1384.

79. *See supra* note 43 and accompanying text.

80. United States v. Washington, 694 F.2d at 1385–87.

fish, the treaty clearly was intended to protect them from non-Indian appropriation of reserved tribal fish supplies.[81]

On the other hand, the court agreed with the district court that the Stevens Treaties impose their own "environmental restraints on activities in the case area."[82] In light of the undisputed degradation that has occurred, it found that federal and state governments have a duty to take "reasonable" steps not only to preserve and mitigate, but also to enhance.[83] Further, the court expected that the reasonable steps taken will be "commensurate" not only with state and federal resources, but also with available technology.[84] The appeals court also noted that the state's choice of development sites could not discriminate against Indian fisheries, a likely possibility for hydro development, since hydro projects often directly impact river fisheries, which have unique importance to Indian tribes.[85]

Whether the panel's decision in Phase II will be modified is yet to be seen. As it now stands, the ruling recognizes that the treaties provide an independent legal basis for mandating habitat protection for treaty fisheries. Nevertheless, it leaves many unanswered questions about the precise scope of the right. It may be, as Judge Reinhardt stated in his concurring opinion, that, as a practical matter, the panel's decision will require the same restraint as that declared by the district court.[86]

D. Other Recent Decisions and Pending Cases Regarding Tribal Fish Protection Rights

The federal government, a plaintiff in the Phase II litigation, is also subject to the treaty habitat protection right.[87] In a pending lawsuit challenging federal authorizations for the Northern Tier pipeline, the United States has been held to a duty " 'to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs.' "[88] The court ruled that the tribes were entitled to an evidentiary

81. *See generally supra* text accompanying notes 26–36 (discussing the background of the treaty rights).

82. 694 F.2d at 1381.

83. *Id.* at 1375, 1389.

84. *Id.* at 1386.

85. *Id.* at 1382, 1387. The Supreme Court has noted that the state may not impose seemingly non-discriminatory regulations that have the effect of denying the tribes their treaty share. *Fishing Vessel*, 443 U.S. at 682–683 (discussing the state's attempted "total ban on commercial net fishing for steelhead"). The treaty right is to be protected on a river-by-river, run-by-run basis. *Id.* at 685; Hoh v. Baldridge, 522 F. Supp. 683 (W.D. Wash. 1981).

86. United States v. Washington, 694 F.2d at 1390 (Reinhardt, J., concurring).

87. *Id.* at 1375 n.1.

88. No Oilport! v. Carter, 520 F. Supp. 334, 371–72 (W.D. Wash. 1981) (quoting United States v. Washington, 506 F. Supp. 187, 208 (W.D. Wash. 1980)).

hearing on their claims that the United States had violated both the treaty rights and the obligations of a trustee charged with protecting tribal fisheries. *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation*,[89] another recent Ninth Circuit decision, further confirms the federal government's habitat protection obligation under the Stevens Treaties. In that case, farmers and local irrigation districts relying on federally constructed and operated irrigation systems, along with the federal agencies administering the irrigation programs, were held bound by the treaties.[90]

Other cases also implement this habitat protection right. On July 13, 1979, Federal District Court Judge Jack Tanner granted a tribe's motion for a preliminary injunction to halt county vegetation removal in the Puyallup watershed because of potential harm to fisheries.[91] On August 5, 1981, the City of Seattle surrendered its preliminary permit to construct the Copper Creek hydro project on the Skagit River because of treaty fishing rights claims and strong public opposition.[92] Recent interim agreements on flow regulation below dams and studies on fish impacts are designed to provide substantial protection to tribal fisheries.[93] The Snohomish County, Washington Public Utility District recently settled certain treaty right claims arising from a hydroelectric project by agreeing to pay $1 million to the tribe for mitigation and fish enhancement purposes.[94] At least two other lawsuits are pending against operators of hydroelectric projects which affect treaty fisheries.[95]

89. Nos. 80-3505, 81-3002, 81-3068, 81-3069, slip op. (9th Cir. Sept 16, 1982).

90. *Id.* at 5.

91. Puyallup Tribe v. Stortine, W.D. Wash No. C79-269T.

92. 46 Fed. Reg. 40,255 (1981).

93. City of Seattle, Washington, Project No. 553, 15 FERC 61,328 (1981) (Ross Dam-Skagit River); City of Tacoma, Washington, Project No. P-1865, 4 FERC 65,290 (1978) (Alder-LaGrande Dam-Nisqually River).

94. *In re* Public Utility District No. 1 of Snohomish County, Project No. 2157 (Settlement Agreement before the United States Federal Energy Regulatory Commission, Feb. 16, 1982) (copy on file with the *Washington Law Review*).

95. In Muckleshoot Tribe v. Puget Sound Power & Light Co., No. 472-72C2 (W.D. Wash. filed July 18, 1972), the Muckleshoot Tribe is asserting both its *Winters* right and treaty fishing rights in seeking declaratory, injunctive and compensatory damage relief from the Buckley hydro diversion. Puget's project has, since 1911, shunted almost all the flow of the White River around the Muckleshoot Reservation. The suit, filed in 1972, was held in abeyance while the parties litigated whether the project needs a Federal Energy Regulatory Commission (FERC) license. FERC jurisdiction over the project has been upheld on the basis of navigability, as demonstrated primarily through photographs and court records of shingle bolt flotation and canoe travel. *See* Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission, 644 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 1053 (1981). In the pending lawsuit, the tribe is asserting a prior and paramount tribal water right for maintaining the White River fishery. The tribe is also relying on Minnesota v. United States, 305 U.S. 382 (1939), to claim that a state court had no jurisdiction to condemn its *Winters* rights or to authorize a diversion of water needed for treaty fishing.

A similar case is Nisqually Indian Tribe v. Centralia, No. C75-31T (W.D. Wash. May 15, 1981) (order denying motion to dismiss and granting motion to amend complaint), in which the Nisqually

III. THE MEASURE OF TRIBAL RIGHTS

A. A Right to Preserve Enough of the Resource for Present and Future Tribal Needs

The Ninth Circuit panel in Phase II discarded the Supreme Court's moderate living standard as unworkable, in favor of a reasonableness test.[96] While the Supreme Court's phraseology was unfortunate, the Ninth Circuit panel discarded the baby along with the bath water and overlooked what was the crucial point: tribes who reserved rights in a natural resource have a right to a quantity of that resource, measured by both their present and potential needs, and not subordinate to other priorities.

When the Supreme Court spoke of a "moderate living" floor to the quantity of fish to which the tribes are entitled under the treaties, it clearly intended to apply the principles it had earlier articulated in cases on reserved tribal water rights.[97] In those cases, balancing, or weighing Indian interests against other priorities or concerns, was expressly rejected as an inappropriate way to measure the amount of water available for tribal use.[98] In quantifying tribal water rights, the Supreme Court has looked to the purposes of the reservation and adopted a standard most consistent with tribal expectations and, presumably, honorable dealings on the part of the United States. As early as 1908, the Supreme Court explained the controlling principle used to determine the scope of reserved tribal rights in a natural resource. In *Winters v. United States*,[99] non-Indian water appropriators relying on state law were enjoined from taking that quantity of water which the Indians might use to make their reservation productive.[100]

Tribe is asserting its treaty fishing rights. The suit was started on February 15, 1975, but had also been delayed while the tribe participated in related FERC proceedings. Judge Tanner rejected arguments that the tribe's claims could be barred by state statutes of limitation and pre-suit notification requirements.

96. The Ninth Circuit panel stated:

> The treaties do not, however, guarantee an adequate supply of fish to meet the Tribes' moderate living needs. Nor do they create an absolute right to relief from all State or State-authorized environmental degradation of the fish habitat that interferes with a tribe's moderate living needs. Rather, we find that when considering projects that may have a significant environmental impact, both the State and the Tribes must take reasonable steps commensurate with the respective resources and abilities of each to preserve and enhance the fishery. Both share in the beneficial use of a fragile resource. Each to the other owes this obligation.

United States v. Washington, 694 F.2d at 1375 (footnote omitted).

97. *See Fishing Vessel*, 443 U.S. at 685–86.

98. *See supra* note 17.

99. 207 U.S. 564 (1908)

100. In that case, the Supreme Court said:

> The Indians had command of the lands and the waters,—command of all their beneficial use,

The *Winters* Doctrine[101] was founded on the idea that the land reservations were intended to provide tribes an opportunity for self-sufficiency. The tribes were to retain that quantity and quality of the water resources flowing through or along their reservations which they needed to continue their traditional ways of livelihood as well as develop new ones.[102] Hence, they reserved the resource for both its present and future use. Because the preservation of fish is no less important to the tribes of the Pacific Northwest than the preservation of water for irrigation was to the Indians in *Winters,* the same analysis should be applied to both resources. As the Supreme Court noted in *United States v. Winans,*[103] fish "were not much less necessary to the existence of the Indians than the atmosphere they breathed."[104]

In quantifying tribal water rights, the Supreme Court has, therefore, adopted a tribal needs standard. Since the measure of tribal needs must be consistent with the purpose of the right—permanent tribal self-sufficiency—the Supreme Court has expressly refused to measure tribal needs based on the current number of Indians or other factors which might restrict the tribe's full development of the reserved resource's potential.[105] Thus the rights are quantified on the basis of the full production potential of the resource. In the case of water rights for agricultural development, that has meant measuring the amount of reserved water flow on the basis of "practicably irrigable acreage."[106] When water rights have been reserved for fishing purposes,[107] the logical application of these principles

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whether kept for hunting, and "grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiators. Neither view is possible. The government is asserting the rights of the Indians. But extremes need not be taken into account. By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government . . . .

207 U.S. at 576–77.

101. *See supra* note 10.

102. *See supra* text accompanying notes 26–36.

103. 198 U.S. 371 (1905).

104. *Id.* at 381.

105. Arizona v. California, 373 U.S. 546, 599–600 (1963).

106. *Id.* at 600; 1982 HANDBOOK, *supra* note 12, at 588–89.

107. *See, e.g.*, Colville Confederated Tribes v. Walton, 642 F.2d 42, 48 (9th Cir. 1981), *cert. denied,* 454 U.S. 1092 (1981); United States v. Anderson, 6 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) F-129 (E.D. Wash. July 23, 1979), 9 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 3137 (E.D. Wash. Aug. 23, 1982).

is to measure the water right by the spawning, rearing and migration potential of the particular waterway involved. The Stevens Treaties fishing rights should therefore be measured by habitat "production potential."[108]

B. "Moderate Living": A Duty to Prevent Waste

In the body of law on reserved tribal water rights, there is reference to a reasonableness standard in measuring the right.[109] Courts, however, have used the reasonableness standard to halt water appropriation which was not necessary for crop productivity, and have distinguished wasteful practices from use of water reasonably needed for economic gain.[110] The concept of "reasonable" needs has therefore served, in the case of water rights, to prevent inefficient, wasteful appropriation, rather than profit potential. The concept can also serve to allow non-Indians to use water that tribes could not possibly put to use in the present, so long as the non-Indian appropriation does not permanently deprive the Indians of the water they might need in the future.[111]

This concept of preventing unnecessary waste has also been applied to Stevens Treaties' fishing rights. In Phase I, the district court expressed concern with preventing both overutilization and underutilization of the fish resource.[112] But, in allowing non-Indians to harvest fish that Indians could not possibly catch because of their current numbers or available gear, the court was not authorizing permanent destruction of a fish supply which tribes might be able to use in the future. In its harvest management rulings, the court was very concerned that the crop was not overharvested and that fish runs were not prevented from perpetuating themselves.[113]

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108. *Cf.* United States v. Washington, 506 F. Supp. 187, 208 (W.D. Wash. 1980) (plaintiff must bear initial burden of proving that state's planned environmental degradation will impair the "production potential" of the fish run; thereafter the state must demontrate that any degradation would not deprive the tribes of their moderate living needs).

109. United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 337 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957). Reasonableness, however, was a standard for measuring the needs for the resource and consequently the right, not a standard for balancing one person's needs against another's. Compare the Ninth Circuit Phase II opinion, *supra* text accompanying notes 77–86 (Indians and non-Indians must share losses from "reasonable development").

110. *See* United States v. Ahtanum Irrigation Dist., 236 F.2d at 340–41; Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9, 22–25 (9th Cir. 1917); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 257–58 (D.D.C. 1973).

111. United States v. Ahtanum Irrigation Dist., 236 F.2d at 326–27; 1982 HANDBOOK, *supra* note 12, at 595–96.

112. United States v. Washington, 384 F. Supp. 312, 384–85 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975) ("while an over-harvest would impair its renewability, an under-harvest during a limited time it is available would result in an irreplaceable waste of the resource").

113. United States v. Washington, 459 F. Supp. 1020, 1108–09 (W.D. Wash. 1978), *aff'd sub. nom.* Puget Sound Gillnetters Ass'n v. United States Dist. Court, 573 F.2d 1123 (9th Cir.), *aff'd in*

It is with this precedent in mind that one must approach the interpretation of the Supreme Court's "moderate living" standard. It would have been more precise, and more consistent with prior precedent, to say that Indians are not permitted to waste the resource. In this sense the tribal right is subject to moderation. Thus, non-Indians may use, temporarily, the Indian half of the fish resource that exceeds the Indians' current needs. But non-Indians cannot now, or at any time in the future, permanently usurp or damage any fraction of the tribes' property interest in the fish supply that the treaties secured as the primary means of tribal self-sufficiency and cultural cohesion.[114]

C. *"Moderate Living": A Tribal Right to the Full Economic Potential of its Reserved Share*

The Supreme Court's concern that tribes not be permitted to preempt fish resources which they could "not possibly use" is evident in its guidelines for future downward adjustments in the current fifty-fifty allocation of runs destined for traditional tribal fisheries.[115] Allocation reductions require a showing of a drastic change in the treaty status or needs. And present inability to harvest their maximum entitlement would not necessarily justify permanent reduction of the Indian fish supply.

The concerns expressed by the Ninth Circuit about a "moderate living" standard lose force when the underlying concept is applied. The variability of present tribal needs is not a real problem because the habitat potential that the tribes reserved is the proper guide.

"Moderate living" was, nonetheless, an ill-advised choice of words. It is doubtful that the Supreme Court intended to say that tribes had somehow, unwittingly, committed themselves forever to a middle-class standard of living, or some other limitation on enjoying the full fruits of their labor. That would certainly be contrary to the "American way." That principle could easily lead to a double standard, whereby non-Indian fishermen, fish processors, retailers and charter boat operators and state fish licensing and taxing entities are unlimited in the revenue they can reap from the non-treaty fish share, but the Indians have to find some other way besides harvesting and marketing and regulating fish to achieve the great American dream.

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part, vacated in part, and remanded sub. nom. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

114. It is therefore important to distinguish non-Indians' permissible uses of the two halves of the fish resource. The non-Indians are free to do anything with the non-treaty share, including destroying it permanently. But they may only harvest temporarily the renewable portion of the treaty half that is not being used by the tribes.

115. *Fishing Vessel*, 443 U.S. 658, 686–87.

At treaty time, tribes were surrounded by a bountiful resource, and expanding markets for their fish.[116] There is no evidence that a lid was being placed on the economic potential of their reserved share. While the Supreme Court spoke of a moderate living standard, it also seemed to recognize that Indians would not have anticipated such a restriction on their fishing activities.[117] The Supreme Court's real concern, apparent from the example it gave as a possible justification for a reduction in the treaty share,[118] seems not to be that tribes might make maximum use of the profit potential of their treaty share. Rather, its concern appeared to be that circumstances might so drastically change some day as to make a fifty percent allocation of the resource to them inappropriate by any reasonable standard, and cause wastage, or underutilization by fishermen of the resource.[119] The Court wanted to make clear that the fifty percent allocation was not a guaranteed percentage, but a ceiling.[120] The ceiling, however, is on the number of fish that tribes can put to reasonable use, not on the profits they can reap from their share.

Not surprisingly, adversaries in litigation with tribes have latched on to the "moderate living" idea and have bombarded tribes with discovery requests about individual and tribal income and needs, and past and present fish catch statistics, in an effort to reduce the entitlement.[121] Lawyers could have a heyday in arguing over what "moderate" means and what factors enter into its equation.[122] Even assuming for the moment that some profit restriction was intended, it is puzzling why anyone would even suggest that tribes are presently exceeding their moderate living needs. It should be obvious that Northwest fishing tribes are not enjoying a moderate living standard by any reasonable criteria. At the February 5,

116. B. Lane, Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century 11–13 (May 10, 1973) (unpublished manuscript) (copy on file with the *Washington Law Review*).

117. *Fishing Vessel*, 443 U.S. at 668 n.12.

118. *Id.* at 687.

119. *Id.*

120. *Id.* at 686 & n.27.

121. *See, e.g.*, Muckleshoot Tribe v. Puget Sound Power & Light Co., No. 472-72C2 (W.D. Wash. filed July 18, 1972).

122. The range of considerations possibly relevant to a tribal needs assessment under a "moderate living" standard is broad. For example, is only income derived directly from harvesting fish to be considered? Or is any fish-related income to be taken into account, including guide services, gear production and sales, processing, etc.? Is income derived from non-fish related sources to be considered? Does the answer to the last question depend on whether those tribal members with other sources of income would fish if more fish were available? What about tribal income? Which tribal governmental services supported by that income meet "moderate" living needs? Defining "moderate" is itself a complicated matter. What is the proper standard of comparison: the annual average earnings of the "middle class?" Would judges, doctors, lawyers, or corporate executives consider their earnings "excessive?" The ramifications for discovery and counter-discovery by tribes to arrive at a reasonable standard for comparison are only limited by lawyers' creativity.

1982 hearing of the Phase II appeal, for example, the state conceded the dubiousness of claiming that tribes do not need the current allocation and pointed to current economic conditions suggesting that the tribe's fish supply was particularly important to them now. The state's own data refutes the suggestion that fifty percent of the current fish supply exceeds tribal needs or that it is satisfying the treaty purpose of promoting tribal self-sufficiency.[123]

In the Phase II decision, Judge Orrick interpreted the fact that the allocation was set at the treaty maximum as suggesting that tribal needs were not being met by the present number of harvestable fish.[124] And, in Phase I, Judge Boldt had no problem in allocating the full fifty percent of the current reserved runs to the tribes, noting that "a substantial number of tribal members [are] at or near poverty level."[125] The United States has also recognized the tribes' need for their full allocation of all available fish.[126]

It would be highly questionable for any federally established agency or council implementing the Northwest Power Act to take suddenly a contrary position. Suffice it to say that the Supreme Court's use of the "moderate living" language is best considered ill-advised dicta. The "moderate" standard, if applied, should be done so consistent with prior precedent limiting uses of natural resources to productive uses and prohibiting waste. The proper measure of the right is half of the habitat's natu-

123. According to a state study published four years after the trial court decision in Phase I, Indians living on or adjacent to the Lower Elwha Reservation had an unemployment rate of 53.2%. More than half of those employed earned less than $5,000 per year. At Port Gamble, the unemployment rate was 44.5%, with more than half of the employed earning less than $5,000 per year. Similar statistics for other Washington tribes underscore their impoverished condition. *See* OFFICE OF PROGRAM RESEARCH, WASHINGTON STATE HOUSE OF REPRESENTATIVES, WASHINGTON STATE AND ITS RESERVATION-BASED INDIAN TRIBES 24–44 (1978).

124. United States v. Washington, 506 F. Supp. 187, 208 (W.D. Wash. 1980).

125. United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974).

126. The United States recently summarized the tribes' situation, in arguing to the Ninth Circuit the validity of the right to hatchery fish which are being propagated in part to replace natural fish destroyed by environmental degradation:

> It is an undeniable fact that the fishery is restricted because the demand for fish exceeds the available supply, and therefore it is necessary to place a 50% ceiling on the Indian share whether or not the moderate living standard is exceeded. Given these conditions, a distinction between naturally spawned and hatchery fish on the basis of program funding or fishery management is meaningless. The district court correctly determined that the 50% ceiling did not currently satisfy the Indian moderate living needs. . . . Until such time as the supply exceeds those needs, every fish regardless of origin taken in tribal historic fishing grounds should count as part of the Indian allocation. If hatchery runs did no more than supplement an abundant supply, there would be adequate leeway for management in favor of special interest groups or other purposes desired by the State.

Brief for Appellee United States at 35, United States v. Washington, 694 F.2d 1374 (9th Cir. 1982) (emphasis added and citation omitted) (copy on file with the *Washington Law Review*).

ral production potential.[127] The present treaty share is not enough to meet tribal needs. It seems a waste of time to speculate now about what was required by prior generations of Indians, or might be required by future generations.

IV. THE NORTHWEST POWER ACT AND THE TRUST RESPONSIBILITY

A. *The Role of the Federal Government*

The Northwest Power Planning Council, as a delegee of federal authority,[128] and federal agencies, such as the Bonneville Power Administration, that are responsible for the Northwest Power Act's implementation,[129] must, of course, bear in mind the special obligations of the federal government in protecting treaty-secured resources. Treaties securing property interests for Indians impose a strict fiduciary obligation on the United States in dealing with those interests, commonly referred to as the federal "trust responsibility."[130] Trust obligations to Indians are also derived from the general "guardian-ward" relationship between the federal government and Indian people.[131]

The trust responsibility applies to all federal agencies, not just the Department of Interior or the Bureau of Indian Affairs.[132] While Congress

127. Use of the word "natural" here is not intended to suggest that the treaty right would not allow tribes to engage in artificial production of fish and share in the results. The district court and the Ninth Circuit in Phase II ruled that the Stevens Treaties right extends to hatchery fish, and the Ninth Circuit Court of Appeals recently held that reserved tribal water rights can be used for a "replacement" fishery. Confederated Colville Tribe v. Walton, 647 F.2d 42, 48 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981). "Natural," as used in this article, is intended to refer to the production potential of a waterway in its pristine state, unencumbered by man's post-treaty habitat degradation.

128. The council is an eight-member body composed of two representatives each from Idaho, Montana, Oregon, and Washington. The Council's purpose is to develop a twenty-year regional plan to govern the region's electricity future. *See* Northwest Power Act, *supra* note 1, § 4(e), 16 U.S.C. 839b (Supp. V 1981).

129. For a general discussion of the responsibilities for implementing the Northwest Power Act, see Mellem, *Darkness to Dawn? Generating and Conserving Electricity in the Pacific Northwest: A Primer on the Northwest Power Act*, 58 WASH. L. REV. XXX (1983).

130. *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) (United States is charged "with moral obligations of the highest responsibility and trust").

131. United States v. Creek Nation, 295 U.S. 103, 109–10 (1935); United States v. Kagama, 118 U.S. 375, 383–84 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

132. Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1982) (any federal government action is subject to the United States' fiduciary responsibility to Indians); White v. Califano, 581 F.2d 697 (8th Cir. 1978) (HEW responsible for providing mental health care for Indians).

may be able to authorize destruction of Indian property, federal agencies cannot.[133]

A tribe is "entitled to rely on the United States, its guardian, for needed protection of its interests."[134] The tribe is not required to prove to what extent and how its property needs protection. Federal agencies have a duty to thoroughly investigate potential adverse impacts on treaty-secured resources and not simply make a "judgment call," or balance competing interests, in choosing the appropriate course of action.[135]

The government's trust duties have been held to include a duty to prevent diversion of water needed for a tribal fishery.[136] The Ninth Circuit Court of Appeals recently described the duty to protect tribal fisheries as one demanding "undivided loyalty."[137] The government's duty is particularly great when it has an interest in the Indian property it is managing.[138] The trust responsibility has also been held to require strict compliance with administrative policies, such as consultation with Indians, that are intended to protect Indian interests.[139]

Ordinarily, the federal trustee must exercise at least the level of care required of a private fiduciary.[140] If, however, the trustee has greater skills or knowledge than the ordinary person, he must use all the skill and knowledge at his disposal.[141] The standard of performance need not be limited by treaty or statute, if common law trust principles impose a higher standard.[142] The courts have repeatedly said that the common law

133. *See* Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919); 1982 HANDBOOK, *supra* note 12, at 517.

134. United States v. Creek Nation, 295 U.S. 103, 110 (1935).

135. Pyramid Lake Tribe v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973). The District of Columbia Circuit has held that compliance with the procedural requirements of environmental protection laws and similar statutes, which permit a balancing of interests, may satisfy the trust responsibility. North Slope Borough v. Andrus, 642 F.2d 589, 593, 611–13 (D.C. Cir. 1980); California v. Watt, 668 F.2d 1290, 1329–35 (D.C. Cir. 1981). But no treaty right was involved in those cases.

136. United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286 (9th Cir. 1981), *modified*, 666 F.2d 351 (9th Cir.), *cert. granted*, 103 S. Ct. 205 (1982); Pyramid Lake Tribe v. Morton, 354 F. Supp. 252 (D.C. Cir. 1973); Northern Paiute Nation v. United States, 30 Ind. Cl. Comm. 210 (1973).

137. United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1306 (9th Cir. 1980), *modified*, 666 F.2d 351 (9th Cir.), *cert. granted*, 103 S. Ct. 205 (1982). *See also* Navajo Tribe of Indians v. United States, 364 F. 2d 320, 322–24 (Ct. Cl. 1966).

138. Navajo Tribe of Indians v. United States, 364 F.2d 320, 323 (Ct. Cl. 1966).

139. Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979).

140. United States v. Mason, 412 U.S. 391, 398 (1973); Navajo Tribe of Indians v. United States, 364 F.2d 320, 322–24 (Ct. Cl. 1966); Menominee Tribe v. United States, 101 Ct. Cl. 10, 19–20 (1944).

141. Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973).

142. Eric v. Secretary of the U.S. Department of Housing and Urban Development, 464 F. Supp. 44 (D. Alaska 1978).

trust responsibility toward Indians and their property must be judged by the "most exacting fiduciary standards."[143]

Even if the Northwest Power Act had not directed restoration and enhancement of fisheries, tribes could claim such relief through litigation. The treaty "right of *taking* fish"[144] is, after all, a property right.[145] Like any other property owner, the tribes would be entitled to monetary damages and/or equitable relief, such as restoration or mitigation, once they proved actual loss or potential harm.[146] Neither Judge Boldt nor Judge Orrick "created" some new, prospective right.[147] They merely interpreted treaties which have been in existence since 1854–1855.

The Ninth Circuit specifically recognized a treaty right to enhancement.[148] The degree to which restoration or enhancement is required depends, of course, on how much of the treaty share has been damaged. The extent of loss need not be proved with mathematical certainty. The "best available evidence," or any "rational basis" will be sufficient.[149] Expert

143. Seminole Nation v. United States, 316 U.S. at 296–97; *see* United States v. Creek Nation, 295 U.S. 103, 110 (1934); Duncan v. United States, 667 F.2d 36, 45 (Ct. Cl. 1981); Indians of the Mancopa-Akchin Reservation v. United States, 667 F.2d 980 (Ct. Cl. 1981); Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct. C. 487, 493 (1964).

144. *Cf. Fishing Vessel*, 443 U.S. at 678 (similar emphasis added to stress that the treaty guaranteed that a substantial volume of fish would be permitted to reach tribal fishing areas).

145. Puget Sound Gillnetters Ass'n v. United States Dist. Court, 573 F. 2d 1123, 1128 (9th Cir. 1978); United States v. Washington, 520 F. 2d 677, 685 (9th Cir. 1975).

146. Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (loss of hunting and fishing rights); United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1298, 1305 (9th Cir. 1981) (water rights), *modified*, 666 F.2d 351 (9th Cir.), *cert. denied*, 103 S. Ct. 314 (1982); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Or. 1977) (fishing rights); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973) (water rights); Confederated Tribes of the Umatilla Indian Reservation v. Calloway, No. 72-211 (D. Or. 1973) (fishing rights); Northern Paiute Nation v. United States, 30 Ind. Cl. Comm. 210 (1973) (water rights); Whitefoot v. United States, 293 F.2d 658 (Ct. Cl.) (fishing rights), *cert. denied*, 369 U.S. 818 (1963); Department of Fisheries v. Gillette, 27 Wn. App. 815, 621 P.2d 764 (1980) (fish).

147. In *Nisqually Indian Tribe v. Centralia*, an interlocutory dismissal of tribal claims for compensation for destruction of treaty fisheries was ordered on the basis that Phase II of *United States v. Washington* dealt only with prospective relief and that the treaties were not "self executing." Nisqually Indian Tribe v. City of Centralia, No. C75-31T, at 4 (W.D. Wash. Nov. 12, 1981) (order granting motion to dismiss claim for money damages). Phase II, of course, has not reached the remedies stage or even determined whether the state has violated the habitat protection right. United States v. Washington, 506 F. Supp. 187, 202 & n.57 (W.D. Wash. 1980). Whatever relief the tribes seek against Washington State in Phase II does not preclude them from compensatory relief against other parties. Furthermore, the *Nisqually* reasoning that the treaties were not self-executing is clearly erroneous. *See Fishing Vessel*, 443 U.S. at 693 n.33. The holding is also contrary to prior decisions finding tribes entitled to monetary damages for destruction of reserved fisheries. *See supra* note 129.

148. United States v. Washington, 694 F.2d 1374, 1375 (9th Cir. 1982).

149. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562–63 (1931); Union Oil Co. v. Oppen, 501 F.2d 558, 569 (9th Cir. 1974); Olympia Oyster Co. v. Rayonier, Inc., 229 F. Supp. 855, 861 (W.D. Wash. 1964).

opinion regarding the extent of lost habitat production potential may suffice.[150]

Providing for artificial production may not be adequate enhancement or restoration of the fisheries. And simply allowing more habitat loss in the hope hatcheries will compensate tribes would be a mistake. The past has proved that reliance on hatchery fish is not the panacea it was once thought to be.[151]

B. The Role of the Tribal Governments

Essential to the negotiation of Indian treaties was the United States' recognition that Northwest bands and villages were sovereign entities. The courts, in interpreting the treaties, have been guided by the premise that Indian treaties are "essentially a contract between two sovereign nations."[152] While early concepts of tribal sovereignty seem to have been somewhat eroded by the Supreme Court in recent years,[153] the scope of tribal sovereignty remains broad.[154] When interpreting federal legislation affecting Indians, the protection of tribal sovereignty is still a necessary consideration.[155]

Tribal sovereignty certainly extends to the management and regulation of treaty-secured fisheries. In signing the Stevens Treaties, there was no agreement that tribes would be divested of tribal control over them.[156]

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150. Carr v. United States, 136 F. Supp. 527, 535–37 (E.D. Va. 1955); Department of Fisheries v. Gillette, 27 Wn. App. 815, 821–24, 621 P.2d 764, 767–69 (1980).

151. In light of the importance of preserving the biological integrity and genetic diversity of naturally spawning andromonous fish, Congressman Lowry and several other Congressional members have introduced H.R. 7456, 97th Cong., 2d Sess. (1982). The bill recognizes the problems that have occurred in relying on hatchery fish stocks.

152. *Fishing Vessel*, 443 U.S. at 675.

153. *See* Montana v. United States, 450 U.S. 544 (1981) (absent historical dependency on fishery, or threat to political integrity, economic security, or health or welfare of tribe, tribe may not regulate non-Indian fishing on non-Indian land within Indian reservation); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (tribal courts implicitly divested of criminal jurisdiction over non-Indians).

154. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982) (upholding tribal authority to tax non-Indian lessees extracting oil and gas from trust land, even though federal government was promoting energy development; Congress had given no "clear indications" that reserved tribal rights were to be diminished); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (state taxation of non-Indian logging held preempted by pervasive federal legislation and inconsistent with tribal sovereignty); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152–53 (1980) (tribes possess "broad measure" of civil jurisdiction over non-Indians on lands in which tribes have a significant interest); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) (tribe and its officers may not be sued for declaratory and injunctive relief); 1982 HANDBOOK, *supra* note 12, at 257.

155. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).

156. *Fishing Vessel*, 443 U.S. at 668 n.12.

Tribal jurisdiction over fishing by members at off-reservation usual and accustomed areas has been specifically upheld.[157] Jurisdiction over non-Indian fishing on reservations has also been upheld where a sufficient tribal interest could be demonstrated.[158] Non-Indian use of reservation water resources would presumably fall within tribal control.[159] Even off-reservation activities of non-Indians may be limited by tribal environmental laws protective of reserved tribal resources.[160]

Whatever the tribe's independent, sovereign authority over the fisheries, Congress has at least "delegated" tribes a veto power over future salmon and steelhead management and enhancement plans.[161] The Northwest Power Act's fish planning provisions should be read together with the Salmon and Steelhead Conservation and Enhancement Act of 1980.[162] The Power Act expressly disclaims any diminution of tribal authority. The Salmon and Steelhead Conservation and Enhancement Act obviously intended future fish management and enhancement plans to be subject to tribal concurrence.[163] Accordingly, the Regional Council should defer to the fish management and enhancement recommendations of the tribes.

C. Fish Scarcity: The Common Concern

To a large extent, the concern that prompted the Northwest Power Act's fish provisions is the same concern that led to heated and lengthy litigation over treaty fishing rights: a once abundant and valuable resource

157. Settler v. Lameer, 507 F.2d 231 (9th Cir. 1980).

158. Mescalero Apache Tribe v. New Mexico, 677 F.2d 55 (10th Cir. 1982); White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981); Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978), *cert. dismissed*, 446 U.S. 968 (1980).

159. Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981). *See also* Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.) (upholding tribal authority to regulate non-Indian riparian rights along a tribally owned lake bed, including the construction of wharves, breakwaters, and similar structures), *cert. denied*, 103 S. Ct. 314 (1982).

160. Nance v. EPA, 645 F. 2d 701, 715 (1981) ("a tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants into the reservation"), *cert. denied*, 454 U.S. 1081 (1981). *But see* UNC Resource, Inc. v. Benally, 514 F. Supp. 385 (D.N. Mex. 1981) (tribal court lacks authority to impose damages against non-Indians for spilling waste into lands occupied by Indians in "Indian Country," but outside boundaries of reservation).

161. Salmon and Steelhead Conservation and Enhancement Act of 1980, 16 U.S.C. §§ 3301, 3311(d), 3321(b) (Supp. V 1981). *Cf.* United States v. Mazurie, 419 U.S. 544 (1975) (semi-sovereign status of tribes justifies congressional delegation of federal power over non-Indians to tribal governments).

162. *See* Bryan v. Itasca County, 426 U.S. 373 (1976).

163. 16 U.S.C. §§ 3311(d), 3321(b) (Supp V. 1981).

has now become scarce.[164] Resolving ambiguities in the Act's fish protection measures in a manner consistent with the mandates of reserved tribal rights is therefore justified, if for no other reason than that they share a common purpose.

The fish and wildlife provisions of the Northwest Power Act reflect an increasing public appreciation of the devastation wrought upon anadromous fisheries by single-minded hydroelectric power development.[165] For too long, the claim that hydroelectric power came cheap masked the exorbitant costs to society in the destruction of fish resources which contributed, and still contribute, substantially to the economic welfare of the Pacific Northwest.[166] Neither the problem, nor congressionally mandated corrective and preventive actions, are limited to the Columbia River basin. They pertain to the Puget Sound area as well.[167]

Similarly, a primary impetus for the recent litigation over Indian fishing rights secured by the Stevens Treaties is the precipitous decline of the salmon and steelhead resource.[168] As the Northwest Power Act was working its way through Congress, tribes were litigating whether the treaty fishing rights they reserved encompassed a right to prevent man-made degradation of essential fish habitat conditions. There was no dispute that substantial destruction of the fishery had occurred.[169]

The concept of fish protection responsibilities in energy development is not new. To reduce the problem to a choice between fish and energy is an unnecessary and misleading oversimplification. Fish passage facilities

164. *Fishing Vessel*, 443 U.S. at 669.

165. *See* Northwest Power Act, *supra* note 1, §§ 2(3)(A), 2(6), 4(e)(2), 4(h), 6(i)(2), 16 U.S.C. §§ 839(3)(A), 839(6), 839b(e)(2), 839(h), 839d(i)(2) (Supp. V 1981); H.R. REP NO 976, Part 1, 96th Cong., 2d Sess. 45, 48–49; 126 CONG REC H10,680 (daily ed. Nov. 17, 1980) (remarks of Rep. Dingell upon presenting S. 885); *A Reexamination of Columbia Basin Fish and Wildlife Program Issues*, NATURAL RESOURCES LAW INST., 19 ANADROMOUS FISH LAW MEMO, Sept. 1982, at 2.

166. *See* United States Comptroller General, Impacts and Implications of the Pacific Northwest Power Bill 22 (EMD-79-105 1979); WASHINGTON DEP'T OF FISHERIES, UNITED STATES FISH AND WILDLIFE SERVICE, & WASHINGTON DEP'T OF GAME, JOINT STATEMENT REGARDING THE BIOLOGY, STATUS, MANAGEMENT, AND HARVEST OF THE SALMON AND STEELHEAD RESOURCES OF THE PUGET SOUND AND OLYMPIC PENINSULAR DRAINAGE AREAS OF WESTERN WASHINGTON 23–25 (May 14, 1973) (prepared for use in Phase I of *United States v. Washington*); United States v. Washington, 506 F. Supp. 187, 198, 203 & n.67 (W.D. Wash. 1980). Besides the Joint Statement, the record in Phase II also contains a substantial amount of other information about the impact of dams on fish in the form of state and federal surveys and studies, discovery responses and depositions, and affidavits of biological consultants. For the Supreme Court's discussion of the tremendous historic and current economic importance of the anadromous fish resource to both Indian and non-Indian fishermen, see *Fishing Vessel*, 443 U.S. at 664-67 (1979).

167. *See* H.R. REP. NO 976, Part II, 96th Cong., 2d Sess. 38 (1980).

168. *Fishing Vessel*, 443 U.S. at 669 (1979).

169. The Phase II district court noted that: "Were this trend [human destruction of the resource] to continue, the right to take fish would eventually be reduced to the right to dip one's net into the water . . . and bring it out empty." United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980).

have been mandated by the Washington State legislature for nearly 100 years.[170] For even longer, United States courts have declared a common law duty to permit anadromous fish to reach the reproduction and growth areas to which they are naturally drawn at highly predictable times and places.[171] One did not have to do much legal research or be a fish biologist to know that a great deal of what has occurred was illegal and unnecessarily wasteful of the fish resource.

Although legislators and judges have long imposed fish protection requirements as legitimate, feasible and appropriate costs of doing business, the requirements are most notable for having been ignored and rarely enforced.[172] The explanation cannot be reduced to the problem of cost. Relatively inexpensive devices could have been, but were not always, installed to prevent fish from being destroyed.[173] Site selection could also have taken into account fish needs, but usually did not. For example, hydro projects might have been more frequently located above natural barriers. Recommendations for operational modifications to protect fish have often fallen on deaf ears.[174] There should be no dispute that technology was adequate to the task of meeting both energy and fish demands, if planners had been inclined to consider both needs.

With rare exception, hydroelectric developers have overlooked fish needs. As a result, fishing interests have already borne a disproportionate share of the real cost of energy production in the Northwest. If any cost-benefit analysis is applied, there needs to be a reallocation of the resource costs and risks involved.

Government agencies must, of course, share the blame with the power producers, because the law was there but they chose not to enforce it. In many instances, such as on the Columbia, the federal government was the prime power developer and operator.

V. CONCLUSION

Understanding the ramifications of reserved tribal rights for hydroelectric energy planning and development is exceedingly important. If fully enforced, those rights will undoubtedly require substantial changes in

170. WASH. REV. CODE § 75.20.060 (1982); *see also* 1889–90 Wash. Laws 106–07 (prohibiting obstruction of streams), *amended*, 1893 Wash. Laws 270.

171. *See, e.g.*, Holyoke Water-Power Co. v. Lyman, 82 U.S. (15 Wall.) 500, 512 (1872); Maddox v. International Paper Co., 47 F. Supp. 829 (W.D. La. 1942); People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897); Cottril v. Myrick, 12 Me. 222, 229–34 (1835); Commonwealth v. Chapin, 22 Mass. 199, 202–03 (1827); Stoughton v. Baker, 4 Mass. 521, 528 (Pick. 1808).

172. *See supra* note 72.

173. *See supra* note 6.

174. *Id.*

past approaches. Full compliance with Indian treaties and other reserved tribal rights is, however, not an impossible task, nor one that will halt the progress of modern civilization. Substantial change in past hydro practices in the interest of preserving and restoring fish and wildlife resources is, after all, what Congress mandated in the Northwest Power Act as a necessary and feasible task.

Reserved tribal rights should serve as an additional incentive to using the full force of the Act to address a very serious and critical problem: the drastic depletion of a highly valuable and irreplacable natural resource.

To the extent that the Act's fish provisions are inadequate to protect the reserved rights of tribes, special measures will be necessary. Those measures, however, will bring benefits to present and future generations of Indians and non-Indians alike. In addition, a nation will have the honor of having kept its word.